87-762

No. .....

In the
Supreme Court of the United States
October Term, 1986

WALTER C. EWERS,

Petitioner,

vs.

BOARD OF COUNTY COMMISSIONERS
OF THE COUNTY OF CURRY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1) Does a county employee's public speech, advocating county participation with the state in cooperative road projects and of using county resources to clear snow from private roads in winter, touch upon matters of public concern and is thus protected by the First Amendment?

2) In a First Amendment employment claim under 42 U.S.C. Section 1983, where the Tenth Circuit Court of Appeals declined to review the trial court's ruling that the employee's speech was protected, but reversed because the jury instructions did not specify which speech he claimed motivated his firing, is the employee entitled to a new trial with proper instructions, rather than a remand for judgment against him?

3) As a matter of law in First Amendment employment cases, must the jury be instructed which protected speech a public employee claims motivated his firing, where the public employer claimed that the abolition of his job was purely the result of a legitimate reorganization of government?

THE PARTIES

Petitioner Walter C. Ewers was the plaintiff in the district court and the appellee/cross-appellant in the Tenth Circuit Court of Appeals. Jack Jeter was also a plaintiff in the district court. Respondent Board of County Commissioners of the County of Curry was a defendant in the district court and appellant/cross-appellee in the court of appeals. Anita Merrill and Michael Gattis, Curry County Commissioners, were defendants in the district court and cross-appellees in the court of appeals. Rule 28.1 of the Rules of the Supreme Court is not applicable.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Walter C. Ewers petitions the United States Supreme Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this case on October 2, 1986.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 802 F.2d 1242 (10th Cir. 1986). The court of

appeals' order denying rehearing (App. B) is reported at 813 F.2d 1583 (10th Cir. 1987). The opinion of the district court (App. C) is not reported.

JURISDICTION

The judgment of the court of appeals (App. A) was entered on October 2, 1986. On March 13, 1987, the court of appeals entered its order denying rehearing (App. B). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

This Petition involves consideration of the following constitutional provisions and statutes: U.S. Const., amend. I, cl. 2 and amend. VII, and 42 U.S.C. Section 1983. The full text of each of these constitutional provisions and statutes is set forth in the Appendix.

STATEMENT OF THE CASE

Petitioner Walter C. Ewers sued Respondent Board of County Commissioners of the County of Curry, New Mexico (Board) and two of the three Commissioners, Anita Merrill and Michael Gattis (Commissioners) in the United States District Court for the District of New Mexico, under 42 U.S.C. Section 1983. Ewers had been employed as

county road superintendent since 1977. Defendant Commissioners were elected to office in November, 1980 and took office January 1, 1981. Under the county personnel policies, a county employee could only be terminated for cause, or if his job was abolished. Ewers alleged, *inter alia*, that the Board abolished his job as county road superintendent, and created the position of county manager with essentially the same duties, as a pretext for firing him in retaliation for his exercise of protected speech. The speech he claimed motivated his termination was his public advocacy of continued county participation with the State in cooperative road paving projects in small towns, and the use of county men and equipment to clear private roads in winter to help ranchers whose access to their cattle was blocked by snow. He also alleged that he was deprived of his legitimate expectancy in continued employment without due process; and, that the circumstances of his firing deprived him of his good name and reputation without due process.

The Board and the Commissioners answered and raised affirmative defenses denying that they fired Ewers for his exercise of speech or for any other reason, and claiming that the abolition of his job was a legitimate reorganization of county government. They claimed legislative immunity, asserting that their actions were not administrative, as in a firing, but were legislative in abolishing Ewers' job. They never claimed any legitimate reason to regulate Ewers' speech, and denied doing so.

Ruling on defendants' motions for summary judgment, the trial court held, *inter alia*, that Ewers' advocacy of continued county participation with the State in cooperative road paving projects, and of the use of county men and

equipment to clear private roads in winter, was protected speech; found no property interest under state law and dismissed that claim because the county personnel policies set forth no procedures to review a termination for cause; and, found that there remained questions of fact on Ewers' First Amendment and liberty interest claims and on the defense of legislative immunity. (App. C). The case was tried before a jury on Ewers' First Amendment and liberty interest claims, on respondents' denial that speech was a motivating factor, and their affirmative defenses including legislative immunity.

The trial testimony showed that Commissioner Merrill attended public Board meetings after she was elected but before she took office. The local news media regularly attended and reported on the Board's open meetings. At one such meeting, in December, 1980, Ewers and Merrill openly expressed their differences of opinion regarding the use of county men and equipment to remove snow blocking private roads. Ewers advocated the use of county men and equipment to relieve snowed-in ranchers when they were in need of help, and expressed his concern about the county's legal liability if this was not done. The newly elected Commissioners were also opposed to the county's continued participation in cooperative road projects with the State. They knew that Ewers was an outspoken advocate of continued county participation in the co-op projects.

At the first meeting of the newly elected Board on January 5, 1981, prior to Ewers' termination, there was extensive discussion of the workings of the road department, and of those issues in particular. Ewers' support of county participation in cooperative road projects was extensively discussed again at the January 19, 1981 Board meeting.

That meeting resulted in Ewers' termination. Other witnesses, including the Chairman of the Board, expressed the opinion that the "abolition" of Ewers' position as road superintendent was a pretext to terminate him.

As framed by the pleadings, Ewers' First Amendment claim involved an issue of pure pretext, not a mixed motive issue for the jury. Ewers claimed he was fired for his speech, and the Board claimed that Ewers' speech had nothing to do with its action in abolishing his job. Consistent with their defense, the defendant Commissioners testified at trial that Ewers' speech was not in any way a motivating factor in his termination.

The jury returned a general verdict for compensatory damages in Ewers' favor against the Board. The jury awarded only punitive damages against the Commissioners, which portion of the verdict was stricken by the trial court. Judgment was entered for Ewers and against the Board on the jury verdict, and for the Board and the Commissioners on Ewers' property interest claims. The Board appealed from the judgment. Ewers cross-appealed against the Board and the Commissioners from the trial court's dismissal of his property interest claim.

The Tenth Circuit Court of Appeals reversed the jury's verdict on plaintiff's First Amendment and liberty interest claims. On the First Amendment issue, the Tenth Circuit refused, in the absence of a complete record, to review the trial court's ruling on summary judgment that Ewers' speech was protected. Thus, the Tenth Circuit limited its review of the First Amendment claim to the Board's argument that the jury instructions did not specifically identify which speech was alleged to have been the

motivating factor in Ewers' firing.[1] Focusing on an analysis of First Amendment case law, the Tenth Circuit held that the jury instruction given was overbroad because, by not identifying which speech was protected, the instruction allowed the jury to improperly speculate on which conduct might have been a motivating factor in the Board's decision to abolish Ewers' job. The jury verdict was reversed on that basis on the First Amendment claim.

Then, without analysis or explanation, the Tenth Circuit stated: "The trial record simply does not contain any evidence of such protected speech." Apparently, based on that one sentence, the Tenth Circuit remanded for entry of judgment for the Board, rather than for a new trial to a properly instructed jury.

Ewers petitioned for rehearing of the remand for entry of judgment against him, rather than for retrial on his First Amendment claim; and, of the Tenth Circuit's refusal to address the merits of his cross-appeal on the property interest claim. On March 13, 1987, the Tenth Circuit entered its order granting the rehearing only as to the cross-appeal, which remains pending. Thus the Commissioners, who were cross-appellees only, are not involved in this petition.

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[1]Both plaintiff and defendants proffered jury instructions on the First Amendment issue which did specifically identify the protected speech plaintiff claimed was the motivating factor for his termination. The trial court denied these requested instructions and gave its own which did not identify the speech at issue, but did instruct that as a matter of law plaintiff's speech was protected.

REASONS FOR GRANTING THE PETITION

I.

THE TENTH CIRCUIT ERRED BY HOLDING THAT PETITIONER'S SPEECH WAS NOT PROTECTED UNDER THE FIRST AMENDMENT.

This Court need not accept this case for plenary review. It can grant this petition and limit the expenditure of its scarce judicial resources by summarily ruling on the limited issue of whether petitioner's speech was protected under the First Amendment. The decision of the Tenth Circuit Court of Appeals to deny petitioner his right to present his First Amendment claim to a properly instructed jury presents this Court with an opportunity to clarify for the lower federal courts the meaning of its rulings in *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983) that a public employee's speech is protected under the First Amendment when the statement at issue addresses "matters of public concern." 461 U.S. at 145. *Cf., Allen v. Scribner*, 812 F.2d 426, 430 (9th Cir. 1987); *Jones v. Dodson*, 727 F.2d 1329, 1333 (4th Cir. 1984). *See also, The Supreme Court, 1982 Term*, 97 Harv.L.Rev. 70, 170-71 (1983).

Without analysis or explanation, the Tenth Circuit held that the trial record contained no evidence of plaintiff's protected speech. By undertaking no analysis, the Tenth Circuit utterly failed to heed this Court's admonition that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick v. Myers*, 461 U.S. 138, 147-48 (1983) (footnote omitted). *Cf.*, Sup.Ct.R. 17.1(c).

The trial record contains ample evidence that the context of plaintiff's speech was that of a public employee speaking on matters of public policy at a public meeting of the governing body of Curry County. The form of the speech was direct public comment to the lawmakers. The content of the speech was explanation and advocacy of the use of county men and equipment for the removal of snow from private roads during winter for the benefit of county citizens, and of the continued use of county equipment and manpower in co-op projects with the State for the betterment of roads in the smaller communities of the county.

In its order denying summary judgment, the trial court stated:

> In the case at bar, the Board was the governing body concerned with making decisions on whether the county would enter cooperative road-building agreements with the state and whether county equipment would be used to clear private roads. These are not issues of internal management, but are matters of general public concern. As such, they are entitled to first amendment protection.
>
> The defendants' second contention that the county's need for efficient management outweighs the plaintiff's first amendment rights also is not well taken. The defendants have presented no evidence indicative of whether the plaintiff's expression of his views hampered the efficient operation of the road department. Therefore, summary judgment on the first amendment issue is inappropriate.

Ewers v. Board of County Commissioners of the County of Curry, No. CIV 83-0238 JB (D.N.M. June 25, 1984). (App. C, App. 26-27).

Ewers' statements were on "matters of public concern" and were therefore protected under the First

Amendment. The Tenth Circuit erred in concluding otherwise.

> "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government," *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the "highest rung of the heirachy of First Amendment values" and is entitled to special protection. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Carey v. Brown*, 447 U.S. 455, 467 (1980)."

Connick v. Myers, 461 U.S. at 145.

Ewers participated in public discussion at county Board meetings. He advocated policies he hoped the Board would adopt in a rural community where the condition of the roads and access to them in bad weather were issues of "legitimate public concern" to county citizenry, ranchers and townspeople alike. This Court can avoid plenary consideration by summarily ruling that plaintiff's speech was protected, and instructing the Tenth Circuit to remand this case to the district court for a new trial before a properly instructed jury.

II.

THE TENTH CIRCUIT EXCEEDED THE PROPER SCOPE OF REVIEW BY REACHING THE ISSUE OF WHETHER PETITIONER'S SPEECH WAS PROTECTED, DEPARTED FROM THIS COURT'S HOLDING THAT WHETHER SPEECH IS PROTECTED MUST BE DETERMINED BY THE CONTENT, FORM AND CONTEXT OF THE SPEECH, AND IMPROPERLY DENIED PETITIONER'S RIGHT TO PRESENT HIS FIRST AMENDMENT CLAIM TO A JURY.

"[T]rial by jury is more than an instrument of justice and more than one wheel of the constitution. It is the lamp

that shows that freedom lives." Lord Devlin, Hamlyn Lectures on "Trial by Jury" delivered at London University, November, 1956, in Watkins, *Trial by Jury: A Time for Reappraisal,* 16 Cambrian L.Rev. 5, 7 (1985). The Tenth Circuit decision in this case gives this Court the opportunity to reemphasize, as a matter of policy, the fundamental right of litigants in the federal courts to present their claims to a jury for determination without fear of the unwarranted usurpation of that decisionmaking process by an appellate court which improperly substitutes its judgment for that of the jury.

The Tenth Circuit initially recognized the limited scope of its review.

> [T]he [trial] court determined, as a matter of law, that Ewers had engaged in constitutionally protected speech. . . . [W]e are unable to review appellants' allegations of error insofar as their efficacy may or may not be predicated upon evidentiary matters considered by the court prior to trial and not included in the record on appeal. . . .
>
> With this limitation, our determination of whether the court erred in submitting Ewers' First Amendment claim to the jury must concentrate on appellants' argument that the submission was erroneous as a matter of law because: "D. The trial court erred in submitting to the jury an instruction which did not specifically set forth the protected speech because it allowed the jury to find liability on impermissible grounds." (Appellant's Brief in Chief at 38.)

Ewers v. Board of County Commissioners of the County of Curry, 802 F.2d 1242, 1246 (10th Cir. 1986). (App. A, App. 7). Nonetheless, after holding that the jury instruction was erroneous, the Tenth Circuit went on to also hold that plaintiff's speech was not protected.

By holding that petitioners' speech was not protected, without *any* analysis, after refusing to review the trial court's well reasoned ruling that it *was* protected, the Tenth Circuit engaged in a brand of judicial activism that may become all too prevalent unless this Court calls a halt, promptly and without question, to this disturbing practice.

> I am in full agreement with the opinion. I write merely to echo my concern, so aptly expressed by one of my colleagues, that juries in Section 1983 cases are becoming like law clerks, handing their recommendations to the judge who then does as he sees fit. As a district judge since 1940, I have great confidence in the jury system. I am alarmed by what I sense to be an increased prevalence of directed verdicts against prevailing plaintiffs in Section 1983 actions. In my opinion, this case represents a less-known but equally dangerous brand of "judicial activism," and our reversal here should serve as a warning or lesson concerning the precariousness of such activism.

Van Houndnos v. Evans, 807 F.2d 648, 657 (7th Cir. 1986) (Campbell, J., concurring). *Cf., Eiland v. City of Montgomery*, 797 F.2d 953 (11th Cir. 1986), petition for cert. filed and pending, No. 86-1144 (U.S. January 5, 1987). *See also*, Schnapper, *Municipal Liability: From Monell to Tuttle and Pembaur*, 2 Police Misconduct and Civil Rights L. Rep. 1, 11 (1987).

The Seventh Amendment ordinarily limits the appellate courts to a review of the jury instructions, just as appellate review of factfinding by district judges is restricted by Rule 52 of the Federal Rules of Civil Procedure. In recent years, this Court has been particularly emphatic in its insistence that the appellate courts respect the commands of Rule 52. *See, e.g., Anderson v. City of*

Bessemer City, 470 U.S. 564 (1985); *Pullman Standard Co. v. Swint,* 456 U.S. 273 (1982).

Unlike the decision of the Tenth Circuit, this Court has respected the restrictions that ordinarily limit the role of appellate courts. In two recent appeals coming to this Court after jury verdicts, this Court carefully confined its review to an examination of the jury instructions. *See, City of Oklahoma City v. Tuttle,* 471 U.S. 808 (1985); *Owen v. City of Independence,* 445 U.S. 622 (1980). In *Tuttle,* this Court reversed because of an inadequate instruction and, unwilling to guess how a properly instructed jury might have decided the case, remanded for a new trial with proper instructions. The same is required here. In this case, this Court has the opportunity to instruct the appellate courts to heed to the Seventh Amendment, by reversing and instructing the Tenth Circuit to remand to the district court for a new trial with proper instructions.

This Court's concern for improper judicial interference with the jury system should be greatest in cases which address First Amendment rights involving speech on public issues. Especially so in this case since the Tenth Circuit found that the trial court's ruling that petitioner's speech was protected was not subject to its review, and that the issue before it was limited to the defendants' claim of error in failing to identify the particular speech in the jury instructions.

Once the Tenth Circuit found error in the instructions, it should have remanded for a new trial with proper instructions. Its conclusion without analysis that petitioner's speech was *not* protected was unwarranted by the terms of its own limited review. Finding petitioner's speech to

be not protected compounded the error of reaching the issue at all. It shows the Tenth Circuit's failure to adhere to the proper standard of review on appeal by reweighing the evidence of motivation and substituting its judgment for that of the jury. *Cf., Brown v. McGraw-Edison Co.*, 736 F.2d 609, 612-13 (10th Cir. 1984). In doing so, the Tenth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. S.Ct.R. 17.1(a).

III.

IN A PURE PRETEXT CASE, WHERE PLAINTIFF CLAIMS THAT THE COUNTY ABOLISHED HIS JOB IN RETALIATION FOR HIS PROTECTED SPEECH, AND THE COUNTY DENIES THAT HIS SPEECH MOTIVATED ITS DECISION AT ALL, THE JURY NEED NOT BE INSTRUCTED AS TO THE SPECIFIC SPEECH IN QUESTION.

This Court has yet to rule on whether, in *all* cases alleging adverse personnel action based on First Amendment conduct, the jury must be instructed as to the particular conduct alleged to be the motivating factor. This case presents the opportunity for the Court to further refine its rulings in *Pickering* and *Connick*, and to distinguish those mixed motive cases from pure pretext cases such as this. Petitioner claimed he was fired in retaliation for his speech. The Board denied that his speech in any way motivated its decision to abolish his job. The question for the jury was not *which* speech might have motivated the Board's action, but *whether* speech motivated the Board's action.

On appeal, Ewers argued that since the jury was instructed that his speech was protected and the Board denied that speech was a motivating factor at all, there was no basis for any possible jury confusion or improper speculation on which speech may have motivated his termination. Therefore, he argued, the protected speech need not have been particularly identified for the jury in the instructions. The only question for the jury was: did Ewers' speech motivate the Board's decision to terminate his job, or was the Board motivated solely by a wish to reorganize county government?

The Tenth Circuit rejected that argument, relying on two factually distinguishable mixed motive cases. *See, Mt. Healthy City Board of Education v. Doyle,* 429 U.S. 274 (1977); *Key v. Rutherford,* 645 F.2d 880 (10th Cir. 1981). In those cases, the need to identify the protected speech resulted from the presentation of evidence to the factfinder of both protected speech and unprotected conduct as possible motivating factors. Since defendants denied that their actions were motivated at all by petitioner's speech, this Court can and should, for the first time in the context of pure pretext First Amendment employment litigation, expressly apply the teaching of *United States Postal Service Board of Governors v. Aikens,* 460 U.S. 711 (1983) that the factfinder "must decide which party's explanation of the employer's motivation it believes." *Id.,* at 716. The trial record contains ample evidence that Ewers' protected speech was in fact the motivating factor in his termination, and the jury properly could have returned a verdict for him based thereon. *Cf., Hurd v. American Hoist & Derrick Co.,* 734 F.2d 495, 498-99 (10th Cir. 1984).

In this case, where the issue for the jury was a pure pretext question, not a mixed motive issue, there was no

necessity to identify in the jury instructions the specific speech at issue. The Tenth Circuit erred in reversing the jury's verdict on that basis.

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CONCLUSION

The Tenth Circuit holding that there is no evidence in the record of protected speech is contrary to this Court's rulings in *Pickering* and *Connick* that speech involving "matters of public concern" is protected under the First Amendment. Its decision denies petitioner his right to present his First Amendment claim to a properly instructed jury. The decision below violates established principles of appellate review and evidences a disturbing trend toward "judicial activism" in the appellate courts in 42 U.S.C. Section 1983 cases.

This case raises an important question yet to be addressed by this Court: In a First Amendment employment case involving a claim of pure pretext, as opposed to mixed motive, must the jury be instructed as to the particular speech in issue?

In this year celebrating the bicentennial of our nation's Constitution and the rights and privileges secured to the people by it, this case cries out for this Court to remedy a great wrong. The Tenth Circuit decision is a wrong not only against petitioner, but against the First and Seventh Amendments themselves. On behalf of himself, and to insure free speech and the continued vitality of the jury system, petitioner seeks redress in this Court. This Court should summarily hold that petitioner's speech

was protected, and instruct the Tenth Circuit to remand for a new trial.

For the reasons stated above, this petition for a writ of certiorari to review the decision below should be granted.

Respectfully submitted,

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

WALTER C. EWERS,

Plaintiff-Appellee, Cross-Appellant,

JACK JETER,
Plaintiff,

Nos. 84-2437
& 84-2477

v.

(Filed October 2, 1986)

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CURRY and ANITA C. MERRILL and MICHAEL C. GATTIS, Individually and in their capacities as members of the Board of Curry County Commissioners,

Defendants-Appellants,
Cross-Appellees.

Appeal from the United States District Court
for the District of New Mexico

CIV-83-0238-JB

Jeffrey J. Dempsey, Cooperating Attorney, American Civil Liberties Union of New Mexico (Philip B. Davis, Legal Director, with him on the brief), Albuquerque, New Mexico, attorneys for Plaintiffs.

Arthur P. Brock and Laurie A. Vogel (Steven L. Bell with them on the brief) of Atwood, Malone, Mann & Turner, P.A., Roswell, New Mexico, attorneys for Defendants.

Before HOLLOWAY, Chief Judge, BARRETT, Circuit Judges, and SAM,* District Judge.

BARRETT, Circuit Judge

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* The Honorable David Sam, United States District Judge for the District of Utah, sitting by designation.

The Board of County Commissioners (Board) of the County of Curry,[1] Anita Merrill (Merrill), and Michael Gattis (Gattis), hereinafter collectively referred to as appellants, appeal from a jury verdict and judgment in favor of Walter Ewers (Ewers). Ewers cross-appeals the dismissal of one of his claims.

Ewers was hired in August, 1977, as the county's first road superintendent to supervise road maintenance and advise the Commissioners generally. As a county employee, Ewers could only be terminated for good cause or if his job was abolished and he was answerable to the County Commissioners. Throughout the course of his employment as road superintendent, Ewers met with the County Commissioners twice a month at their regular meetings and he had regular contact with the Commissioners by telephone. Ewers also acted as a liasion for the County Commissioners, fielding complaints from citizens of the county and reporting such complaints back to the Commissioners.

As road superintendent, Ewers was heavily involved with cooperative road projects between the county and the State of New Mexico. Co-op projects allowed local governments to work with the State Highway Department on various road work. The Highway Department provided approximately 50% of the cost of a project in the form of funds for the purchase of materials. The local govern-

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[1] Although the Board is an entity of the County of Curry, the County is not a designated party herein.

ment provided approximately 50% of the cost of the project in the form of men and equipment.

In November, 1980, Gattis and Merrill, two of the appellants herein, were elected to the Board. Prior thereto, Gattis ran on a platform that called for a more efficient county government and better county roads; Merrill had determined, after attending a number of Commission meetings as a private citizen, that the county did not need a road superintendent and that the Commissioners could do that job themselves. Both Gattis and Merrill assumed the office of County Commissioner on January 1, 1981.

The first meeting of the Board to include newly elected commissioners Gattis and Merrill was held on January 5, 1981. They served with Charles Stockton (Stockton), the incumbent commissioner. Ewers did not attend the meeting due to illness. At this meeting, Stockton was elected Commission Chairman and the Board rehired all of the county's road employees except Ewers. The Board determined that it wanted to discuss the road department with him.

The next meeting of the Board occurred on January 12, 1981. During this meeting, which Ewers attended, considerable discussion was devoted to the county roads. Both Gattis and Merrill stated that they believed more attention should be given to the county's roads. At no time during the meeting, however, did the Board give Ewers any new directives as road superintendent.

The Board met next on January 19, 1981. At this meeting, the Board engaged in a lengthy discussion with Ewers about co-op projects and the time it took to com-

plete them. Ewers was subsequently excused from the meeting. The Board thereafter, on a 2-1 vote, with Stockton in the minority, abolished the job of road superintendent effective March 1, 1981. During the evening of the same day, Stockton telephoned Ewers and related that: the Board had terminated his position; he did not believe that Merrill liked Ewers; and although Merrill wanted to fire Ewers as of that day, the Board ultimately agreed that his termination would be effective February 28, 1981.

In the six weeks that Ewers remained employed as road superintendent, the Board held two additional meetings of significance. On February 2, 1981, the Board discussed in detail with Ewers its concern over the time it was taking to complete certain co-op projects. Although Ewers attempted to explain co-op projects, the Board apparently remained confused on the operation of co-op projects. Thereafter, and at the suggestion of Ewers, the Board agreed that it would be beneficial to invite several employees of the State Highway Department to a special meeting to discuss co-op projects.

In accordance with this decision, a special Board meeting was held February 10, 1981. During the course of the meeting, Merrill expressed concern that someone was "dragging out" the co-op projects and "padding the books." Ewers responded that the statement was a lie. A State Highway Department employee stated that he did not believe that anyone had been dishonest.

Ewers' last day as county road superintendent was February 28, 1981. Thereafter, Ewers spent considerable time looking for a job but was unable to find work. Although Ewers testified that he felt he had been defamed, he

acknowledged that his age, poor health, and limited education were all factors in his inability to find work.

After abolishing the job of road superintendent, the Board created the job of county manager. Although the Board failed to formally adopt a job description for the position of county manager, it is clear that the position of county manager required a college degree or the equivalent in experience. The county manager was assigned tasks by the Board, many of which were the same Ewers had performed. He was also required to supervise the courthouse service staff, perform purchasing and some budget preparation. Additionally, the Board selected a road crew employee in each district to serve as a working foreman.

Ewers subsequently sued appellants alleging that: his position as road superintendent was abolished as a pretext to terminate him in retaliation for the exercise of his First Amendment right to free speech; the Board had conspired to deprive him of equal protection of the law; the Board had deprived him of a liberty interest in his reputation; the Board had deprived him of a property right without due process of law. Within their answer, the appellants alleged that they had acted properly in eliminating the job of road superintendent in an effort to enhance the efficiency of the county.

The Board moved for summary judgment. The court subsequently entered an order in which it granted appellants' summary judgment on Ewers' claims of denial of equal protection, conspiracy, and deprivation of a property interest. The court then, after finding that Ewers had engaged in constitutionally protected speech, ruled that the case would proceed to trial on Ewers' claim of violation

of First Amendment rights to free speech and deprivation of liberty interest without due process of law.

During trial, Ewers testified that: the Board abolished his job in retaliation for the exercise of his First Amendment right to free speech; the Board's decision to abolish his job was merely pretextual; and he was stigmatized by the manner in which his employment with the county was terminated and by Merrill's comments at the February 10, 1981, meeting. The Board moved for a directed verdict on Ewers' claims at the close of the in-chief case and again at the close of all evidence. In each instance, the Board argued insufficiency of the evidence. Both motions were denied. The jury subsequently returned a general verdict in favor of Ewers in the amount of $160,000. The jury also assessed punitive damages against Merrill and Gattis in the amount of $5,000 and $2,500 respectively. These punitive damages were set aside by the court because the jury did not assess compensatory damages against either Merrill or Gattis. The court awarded Ewers attorneys' fees of $39,500.

On appeal, appellants contend: (1) the court erred in submitting Ewers' First Amendment claim to the jury; and (2) the court erred in submitting Ewers' deprivation of a liberty interest claim to the jury. Within his cross-appeal, Ewers contends that the court erred in dismissing his claim for deprivation of a property interest without due process of law.

I.

Appellants contend that the district court erred in submitting Ewers' First Amendment claim to the jury

because: (a) Ewers' speech was not made as a citizen upon matters of public concern, (b) the court failed to weigh the Board's interest, (c) the balance of interests is in favor of the Board, and (d) the jury instruction did not specifically set forth the protected speech.

As set forth *supra*, prior to trial appellants moved for summary judgment. In its order denying appellants' motion, the court determined, as a matter of law, that Ewers had engaged in constitutionally protected speech. (R., Vol. I at 213). For whatever reason, the evidentiary materials construed by the court in making this determination are not included in record on appeal. Thus, we are unable to review appellants' allegations of error insofar as their efficacy may or may not be predicated upon evidentiary matters considered by the court prior to trial and not included in the record on appeal. *See also* III, *infra*.

With this limitation, our determination of whether the court erred in submitting Ewers' First Amendment claim to the jury must concentrate on appellants' argument that the submission was erroneous as a matter of law because: "D. The trial court erred in submitting to the jury an instruction which did not specifically set forth the protected speech because it allowed the jury to find liability on impermissible grounds." (Appellant's Brief in Chief at 38.)

Appellants argue that the court's instruction, to which they objected, failed to set out the exact speech at issue, and failed to instruct the jury that it should consider whether such speech was a motivating factor in the decision to terminate employee Ewers as required by *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274

(1977), and *Key v. Rutherford,* 645 F.2d 880 (10th Cir. 1981). Appellants contend that the net effect of the court's instruction was to indicate to the jury that all of Ewers' speech, even though not specifically identified, was constitutionally protected. We agree. We hold that the court improperly instructed the jury on Ewers' First Amendment claim and in submitting the claim to the jury.

The court instructed the jury that:

> In order to prove his claim that Defendants violated the first amendment rights, the Plaintiff must establish, by a preponderance of the evidence, each of the following elements:
>
> 1. That Plaintiff engaged in constitutionally protected speech, in that he commented about matters of public interest and concern. You are instructed that I have determined, as a matter of law, that the Plaintiff engaged in constitutionally protected speech, and that this element of his first amendment claim has therefore been established;
>
> 2. That Plaintiff's exercise of protected speech was a substantial and motivating factor in the decision of the Defendants to abolish his position as Road Superintendent; and
>
> 3. That Plaintiff's interest in commenting upon matters of public concern outweighed the Defendants' interest in restricting Plaintiff's expression of his views because such expression hampered or obstructed the efficient operation of the Road Department.

(R., Vol. I at 213.) We agree with appellants that this instruction was overly broad and could lead the jury to conclude that all of Ewers' speech was constitutionally protected.

In *Mt. Healthy City Board of Education v. Doyle,* the court held that "the burden was properly placed" upon

the complaining party "to show that his conduct was constitutionally protected" and a "motivating factor" in the decision not to rehire him. 425 U.S. at 287. In that case, the "conduct" in question was a telephone call to a radio station and an incident involving obscene gestures. Similarly, in *Key v. Rutherford*, the "conduct" which an ex-police chief alleged to be protected and a "motivating factor" in his termination was identified as "Key's communication to the mayor on his [Key's] public support for or participation in the FOP." 645 F.2d at 885.

The necessity of presenting precise evidence of the alleged protected conduct, or speech with a degree of specificity in a damage suit such as this is obvious: Jurors must be knowledgable of the "protected conduct," (or speech) in order to find that the conduct was a "motivating factor" in the action being challenged. As the court opined in *Mt. Healthy v. City Board of Education:*

> Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor"—or to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's re-employment even in the absence of the protected conduct.

We hold that the court's instruction on Ewers' First Amendment claim was overly broad. It allowed the jury to improperly speculate on the "conduct" (speech) which Ewers contended to be the "motivating factor" in the

Board's decision to abolish the position of county road superintendent. The trial record simply does not contain any evidence of such protected speech. Thus, there was no basis in fact upon which the jury could intelligently reach a damage award. Under such circumstances, the court erred in submitting the claim to the jury.

II.

Ewers' deprivation of a liberty interest in reputation claim was predicated upon alleged stigmatizing statements which included statements that Ewers had been "padding the books" and "dragging out" the cooperative projects. Appellants contend that the court erred in submitting the issue of deprivation of a liberty interest to the jury because there was insufficient evidence of a stigmatization in connection with the alteration of Ewers' status.

Prior to trial, the court denied appellants' motion for summary judgment on Ewers' liberty interest claim, and found:

> III. *Claim of Deprivation of a Liberty Interest in Reputation*
>
> In order to establish a claim of deprivation of a liberty interest in reputation under 42 U.S.C. § 1983, a plaintiff must establish two things: first, that the complained of conduct stigmatized or otherwise damaged the plaintiff's reputation, and second, that the reputational damage was "entangled with some other 'tangible interest such as employment.'" *McGhee v. Draper,* 639 F.2d 639, 643 (10th Cir. 1981), *quoting Paul v. Davis,* 424 U.S. 693, 701 (1976) . . . .
>
> Of concern to the plaintiff, *inter-alia,* were statements by Board members that he was "padding his employees' time" and that he was "dragging out" the

> cooperative projects. Depo. of Ewers at 156 . . . . Where stigmatizing charges are made at an official meeting, and the subject of the charges is not allowed a hearing to clear his name, § 1983 liability may attach. *See, McGhee v. Draper*, 564 F.2d 902 (10th Cir. 1977). *Genuine issues of material fact exist with regard to whether these statements damaged the plaintiff's reputation and whether they were sufficiently entangled with the abolishing of the position of road superintendent to constitute a constitutional infringement.* Summary judgment, therefore, is inappropriate on this issue. (Emphasis supplied.)

(R., Vol. I at pp. 40-41.)

At trial, appellants moved for a directed verdict at the close of Ewers' case and at the close of all the evidence. In each instance, appellants alleged insufficient evidence (R., Vol. IV at 441, *et seq.*, and Vol. V at 553). We have carefully reviewed the entire trial record in assessing appellants' challenge to the sufficiency of the evidence on Ewers' claim of deprivation of a liberty interest.

A directed verdict is proper only when the evidence points but one way and is susceptible of no reasonable inferences which may sustain the position of the party against whom the motion is made. *Casias v. City of Raton*, 738 F.2d 392, 394 (10th Cir. 1984). A motion for a directed verdict should be cautiously granted and the decision in a motion for a directed verdict will not be reversed unless, upon review, it is determined that the trial court's evaluation of the evidence was clearly erroneous. *Brown v. Reardon*, 770 F.2d 896, 903 (10th Cir. 1975). Mindful of these standards, we hold that the district court erred in denying appellants' motions for a directed ver-

dict on Ewers' liberty interest claims. The evidence, when analyzed in accordance with the court's instruction on a liberty interest violation, is insufficient to support the jury's verdict and was susceptible of no reasonable inferences to sustain Ewers' claim when appellants moved for a directed verdict.

The court instructed the jury that Ewers, in order to establish his claim for deprivation of a liberty interest, must prove by a preponderance of the evidence that: (1) defendants falsely accused him of padding time records and dragging out cooperative road projects; (2) the accusations were made in public; (3) the accusations were made in connection with the abolition of his job; (4) the accusations stigmatized him and effected his future employment opportunities; and, (5) the defendants deprived him of an opportunity for a hearing at which he could defend against the stigma which added injury to his good name, reputation, honor, and integrity. Having carefully examined the record, and giving Ewers the benefit of all reasonable inferences therein, we hold that Ewers failed to establish all of the five elements of a liberty interest violation in accordance with the court's instruction.

Initially, with respect to the first element, appellants acknowledge that Merrill and Gattis did express concern that someone was "padding the books" and that the cooperative projects were being "dragged out." We conclude that Ewers presented sufficient evidence which, if accepted by the jury, could warrant a determination that Merrill and Gattis had, in effect, falsely accused Ewers. Ewers established the second element of his alleged liberty interest violation, public disclosure, because the February 10, 1981, meeting was open to the public.

Ewers failed, however, to establish by a preponderance of the evidence, the third element of his alleged liberty interest violation: that the false accusations "were made in connection with the abolition of plaintiff's position." The Board abolished the job of road superintendent on January 19, 1981. The public accusations which Ewers contends violated his liberty interest were made three weeks *after* the job was abolished. Nothing in the record indicates that the statements made by Merrill and Gattis at the February 10, 1981, meeting, i.e., that someone was "padding the books" and that the co-op projects were being "dragged out," "were made in connection with the abolition of Plaintiff's position."

Even were we to assume, *arguendo,* that Ewers had established the first three elements of his alleged deprivation of a liberty interest, he nevertheless failed to establish the fourth and fifth elements. The court instructed the jury that the fourth element Ewers had to prove by a preponderance of the evidence in order to establish a deprivation of a liberty interest was:

> That those accusations stigmatized Plaintiff in that they had the general effect of curtailing his future freedom of choice with regard to employment opportunities.

(R., Vol. I at 215.)

Although the court did not elaborate on the "stigmatization" required to establish a liberty interest violation, we believe that it is appropriate to do so. In *Asbill v. Housing Authority of Choctaw Nation,* 726 F.2d 1499, 1503 (10th Cir. 1984), we stated:

* * *

> In a series of cases, the Court has held that for an employee to make a successful liberty deprivation claim she must show that her dismissal resulted in the *publication* of information which was *false* and *stigmatizing* . . . [A]ssuming that Thompson's statements were false and published, it is doubtful that these statements were of the magnitude that could be considered "stigmatizing."
>
> • • •
>
> The Supreme Court has indicated that for statements to be stigmatizing they must rise to such a serious level as to place the employee's good name, reputation, honor, or integrity at stake. *Board of Regents v. Roth, supra,* 408 U.S. at 573, 92 S.Ct. at 2707 (1971). As an example, the Court has noted that a charge of dishonesty or immorality would be stigmatizing. *Id.* Such charges attach like a "badge of infamy" to an employee—how can they be satisfactorily explained or justified to future employers? (footnotes omitted.)

Under *Asbill,* statements are stigmatizing if they "place the employee's good name, reputation, honor, or integrity at stake." As such, false and public charges of "padding the books" and "dragging out" cooperative jobs, would be considered stigmatizing under *Asbill* because such charges would "place the employee's (Ewers) good name, reputation, honor, or integrity at stake." As such, Ewers established the stigmatizing nature of the statements under *Asbill.* However, the court's instruction, which is not challenged on appeal and which we do not perceive to be clearly erroneous, defined stigmatizing accusations as those which had the "general effect of curtailing his future freedom of choice or action with regard to employment opportunities." Ewers failed to establish that he was stigmatized under this instruction.

Ewers testified that he felt he had been defamed by the Board's abolishment of the job of road superintendent. However, he candidly acknowledged that although he had looked for another job, his job hunting efforts were restricted to the vicinity of his home town because his health required that he be close to a doctor and that although several jobs were available, he did not have the educational background for them. On cross-examination Ewers acknowledged that he had stated in a deposition that: one of the reasons he couldn't find work was because there were no jobs; he was unable to find work because of his health condition, and he had become disabled since he lost his job. Under these circumstances, we hold that Ewers failed to establish that the "accusations stigmatized [him] in that they had the general effect of curtailing his future freedom of choice with regard to employment opportunities."

Ewers also failed to establish the fifth element of his claim for deprivation of a liberty interest, "[t]hat the defendants deprived [him] of an opportunity for a hearing at which he could defend against the stigma and injury to his good name, reputation, honor, and integrity." Assuming that Ewers was stigmatized under *Asbill* by the allegations of "padding the books" and "dragging out" of projects made during the February 10, 1981, public meeting, Ewers failed to satisfy the fifth element because he was at the meeting and was afforded the opportunity to clear his name.

Due process requires the opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Elridge*, 424 U.S. 319, 333 (1976); *Armstrong v. Monzo*, 380 U.S. 545, 552 (1965); *Miller v. City of Mission, Kansas*, 705 F.2d 368 (10th Cir. 1983). Ewers had notice of the state-

ments which allegedly damaged his name because he was present when they were made. In fact, he immediately responded to them by presenting contrary views. He testified that he had been given an adequate chance to clear up any misconceptions. He was satisfied and no further opportunities to be heard were requested. None were necessary under these facts. Ewers failed to present any evidence that he was denied the opportunity for a hearing at which he could defend himself.

During cross examination, Ewers testified:

Q. And a result—as a result of that meeting with the highway employees present, they pretty much agreed that you had done nothing wrong?

A. *Yes, sir, they did, they sure did.*

Q. *So your name was cleared?*

A. *Yes, sir.*

Q. *Thank you. And the subject of the co-op's didn't come up again much after that, did it, sir?*

A. *No, sir.*

(R., Vol. III at 168-69).

III.

In his cross-appeal, Ewers contends that the Court erred in dismissing his claim for deprivation of a property interest without due process of law. Ewers also contends that the court erred by failing to reconsider its dismissal of his property interest claim and in refusing to instruct the jury on the claim.

We are unable to review Ewers' contention that the court erred in dismissing his property interest claim inasmuch as the evidentiary matters considered and relied on

by the court in granting appellants' summary judgment motion on this claim, including Ewers' deposition, are not included in the record on appeal. *See,* Fed. R. App. Pro., rule 10(b), 28 U.S.C. Similarly we decline, in the absence of a complete record, to review the court's decision not to reconsider its dismissal of Ewers' property interest claim and the court's refusal to instruct on the claim.

WE REVERSE the general verdict and judgment, the subject of the direct appeal, which were rendered in favor of appellee Ewers in amount of $160,000.00 based upon Mr. Ewers' First Amendment free speech claim and his deprivation of liberty interest in reputation claim under 42 U.S.C. § 1983. WE ALSO REVERSE the district court's order awarding Mr. Ewers' attorneys' fees of $39,500.00. WE AFFIRM the district court's order dismissing Mr. Ewers' claim for deprivation of a property interest without due process, the subject of Mr. Ewers' cross-appeal. WE REMAND with instruction that judgment be entered in favor of the appellants, the Board of County Commissioners of the County of Curry, Anita Merrill and Michael Gattis.

APPENDIX B

MARCH TERM—March 13, 1987

Before Honorable William J. Holloway, Jr., Chief Judge, Honorable James E. Barrett, Circuit Judge, and Honorable David Sam, District Judge*

WALTER C. EWERS, Plaintiff-Appellee-Cross-Appellant, JACK JETER, Plaintiff, vs. BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CURRY and ANITA C. MERRILL and MICHAEL C. GATTIS, individually, and in their official capacities as members of the Board of Curry County Commissioners, Defendants-Appellants-Cross-Appellees.	)	Nos. 84-2437 and 84-2477

Appellee's petition for rehearing is granted. Judge Barrett voted to deny the petition.

Rehearing is limited to appellee Ewers' challenge to the district court's summary judgment dismissing his claimed property interest. The parties are requested to address this court's discussion of the property interest claim set forth in *Ewers v. Board of County Commissioners of Curry County*, 802 F.2d 1242, 1250 (10th Cir. 1986),

and the applicability of *Bailey v. Kirk*, 777 F.2d 567 (10th Cir. 1985).

Appellee Ewers' brief is due March 27, 1987. Appellants' response is due April 10, 1987.

ROBERT L. HOECKER, Clerk

*Of the District of Utah,
sitting by designation

By: /s/ Patrick Fisher, Chief
Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

WALTER C. EWERS,

Plaintiff,

v. Civil No. 83-0238-JB

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF CURRY, and ANITA C. MERRILL and MICHAEL C. GATTIS, Individually and in their official capacities as members of the Board of Curry County Commissioners,

Defendants.

MEMORANDUM OPINION AND ORDER

(Filed June 25, 1984)

THIS MATTER comes before the Court on motions by the individual defendants and by the Board of County Commissioners for summary judgment. The Court, having read the memoranda of the parties, and being otherwise fully advised in the premises, finds that the motions are well taken in part, and should be granted in part and denied in part.

This action was originally joined with an action against these same defendants by Jack Jeter. By order of June 7, 1984, the action of plaintiff Ewers was severed from the action by plaintiff Jeter. Although the motions for summary judgment filed by these defendants were filed prior to severance and addressed the claims of both Ewers and Jeter, the Court will deem the motions to be filed in both

the action brought by Ewers and the action brought by Jeter. Herein, the Court addresses the motions only with respect to Ewers.

This civil rights suit arises from Ewers' loss of his position as road superintendent for Curry County. Defendants Merrill and Gattis are members of the Curry County Board of Commissioners. On January 19, 1981, the Curry County Board of Commissioners [Board] abolished the position of road superintendent and created the position of county manager. The plaintiff contends that this action was mere pretext to terminate his employment. He has asserted claims against the defendants, alleging deprivation of property and liberty interests without due process of law (42 U.S.C. § 1983). The plaintiff has also asserted claims under 42 U.S.C. § 1985(3) and the equal protection clause of the fourteenth amendment. The liberty interest claim encompasses both the plaintiff's right to free speech and his right to be free from stigmatization of his reputation. The defendants have moved for summary judgment on these claims on the following grounds: 1) the speech at issue in the first amendment liberty claim was not protected speech; 2) there was no stigmatization of the plaintiff's reputation, and all comments made about the plaintiff were privileged; 3) there is no allegation of racial animus to support a claim under § 1985(3) or the equal protection clause of the Constitution; and 4) the plaintiff had no property interest in his employment, and even if he had such an interest, due process was afforded. In addition, the individual defendants assert that they have absolute, legislative immunity for their actions in abolishing the position of road superintendent.

I. *Legislative Immunity*

The Supreme Court, while recognizing the applicability of the doctrine of legislative immunity to regional agency members, has expressly reserved ruling on the issue of whether the doctrine of legislative immunity is applicable to members of purely local governing bodies. *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 440 U.S. 391, 404 n. 26 (1971). Since the Supreme Court ruling, seven circuit courts have held that legislative immunity does apply to members of local governing bodies. *Aitchison v. Raffiani,* 708 F.2d 96 (3d Cir. 1983); *Reed v. Village of Shorewood,* 704 F.2d 943 (7th Cir. 1983); *Espanola Way Corp. v. Meyerson,* 690 F.2d 827 (11th Cir. 1982), *cert. denied,* 103 S. Ct. 1431 (1983); *Kuzinich v. County of Santa Clara,* 689 F.2d 1345 (9th Cir. 1982, as amended 1983); *Hernandez v. City of LaFayette,* 643 F.2d 1188 (5th Cir. 1981), *cert. denied,* 445 U.S. 907 (1982); *Bruce v. Riddle,* 631 F.2d 272 (4th Cir. 1980); *Gorman Towers v. Bogoslavsky,* 626 F.2d 607 (8th Cir. 1980). No circuit court has reached a contrary conclusion. The doctrine of legislative immunity furthers the public good by allowing officials to exercise their judgment and to speak freely on contested issues of policy, undeterred by fear of liability or fear of the cost, inconvenience and distraction of trial. *See Tenney v. Brandhove,* 341 U.S. 367, 377 (1951). The electoral process itself serves as a powerful check on improper legislative action. *Aitchison v. Raffiani, supra* at 98. These policies apply as readily to local, legislative officials as they do to state or federal legislators. The Court, therefore, finds that the legislative acts of members of the Board of County Commissioners are entitled to absolute immunity.

This conclusion, however, does not end the inquiry. If the actions of the Board members in abolishing the po-

sition of road superintendent were administrative, rather than legislative, only a qualified immunity would attach. *Goldberg v. Village of Spring Valley,* 538 F. Supp. 646 (S.D.N.Y. 1982); *see also Scheuer v. Rhodes,* 416 U.S. 232 (1974) (executive officials enjoy only a qualified immunity). An official at the local level is much more likely to perform both administrative and legislative duties than an official at the state or federal level. The line of demarcation between the two roles is not easy to draw. Generally, employment decisions on hiring or firing are administrative in nature, and only a qualified immunity attaches. *Detz v. Hoover,* 539 F. Supp. 532 (E.D. Pa. 1982); *Annot.,* 63 A.L.R. Fed. 744, 757 § 3 (1983). Where the county officials act, for policy reasons, to create or abolish positions, however, the action is legislative. *Aitchison v. Raffiani, supra; Goldberg v. Village of Spring Valley, supra.* The question of whether the cost of a particular position is justified by the benefits to the community from the creation of such a position, is a policy question. As such, legislative immunity attaches. *Compare Aitchison v. Raffiani, supra,* and *Goldberg v. Village of Spring Valley, supra, with Detz v. Hoover, supra.*

The cloak of legislative immunity may not be used for subterfuge, however. Where a local governing body merely changes the name of a position, without changing duties or organization, and thereby seeks to subvert the normal procedures for the termination of an employee, it is clear that the act is administrative rather than legislative. It is no more than a firing and the hiring of a replacement.

The court's inquiry into this area is limited. The issue is not one of the motivations of the official, but rather

is one of whether a bald subterfuge has been worked. In the case at bar, there is some evidence that the action of abolishing the position of road superintendent was legislative. Subsequent to the abolition of the position, the county changed the organizational scheme for road management to one utilizing road foremen for each district rather than a centralized management scheme. Depo. of Charles Stockton at 15-16. In addition, the county adopted a county manager form of administration. Exhibit D, Defendants Merrill & Gattis' Motion for Summary Judgment. There is no evidence, however, of whether the decentralization of road supervision was contemporaneous with the abolition of the position of road superintendent. Further, there is inconclusive evidence of whether the duties of the county manager differed from those of the road superintendent. Therefore, the factual development is insufficient to determine whether the acts of the Board in abolishing the position of road superintendent were legislative or administrative. Summary judgment on this issue, therefore, is inappropriate.

II. *First Amendment Claim*

The plaintiff contends that the abolition of his position as road superintendent was retaliatory for the exercise of his first amendment rights. In particular, the plaintiff asserts that the action abolishing the position was taken because of the plaintiff's advocacy of county participation in cooperative road projects with the state and of county help for ranchers whose access to their cattle was blocked by snow. Depo. of Ewers at 93-94. The defendants contend that they are entitled to summary judgment on this issue on the grounds that these issues

are not matters of public concern, and are purely personal matters relating to plaintiff's employment as road superintendent. As a second ground for summary judgment on this issue, the defendants claim that even if these are matters of public concern, the governmental interest in efficient management outweighs the plaintiff's first amendment interests. These arguments are not well taken.

Even where there is no property interest in employment, the decision to terminate an employee may not be based on constitutionally impermissible grounds. *Mount Healthy City Board of Education v. Doyle*, 429 U.S. 274, 283-84 (1977). In *Connick v. Myers*, 51 U.S.L.W. 4436 (U.S. April 20, 1983), the Supreme Court set out a three-step inquiry for determining whether a public employee's first amendment rights had been abridged: 1) whether the statements at issue were constitutionally protected; 2) whether the statements were a substantial motivating factor in the decision to terminate the plaintiff's employment, and 3) whether the government's interest in efficiency outweighed the plaintiff's interest in making the statements. *Id.* In *Connick, supra*, the Court ruled that no first amendment protection was afforded to a questionnaire circulated by an assistant district attorney to the extent it inquired into her colleagues' attitudes toward their supervisors and toward a departmental transfer policy. The Court reasoned that these issues were matters of personal rather than of public concern. The Court found that, in the public employment context, courts should not intervene where the expression leading to discharge cannot fairly be characterized as touching upon a matter of public concern. *Id.* at 4438.

The question of whether a statement is afforded first amendment protection is a question of law. *Id.* at 4438, n. 7. Whether an employee's speech addresses a matter of public concern is to be determined by the content, form and context of the statement. *Id.* at 4438. The defendants contend, in the case at bar, that the fact that Ewers' comments were made at Board meetings and were directed to issues concerning the road department, is indicative that these statements were part of an internal dispute and not revelant to matters of public concern. This reading of *Connick v. Myers, supra,* is too broad. The Supreme Court clearly has recognized that a public employee is not stripped of first amendment protection when he speaks out on matters of public concern which touch upon areas related to his employment. *See Mount Healthy City Board of Education v. Doyle, supra* (teacher's statements to radio station on issue of teacher dress code found to be protected); *Pickering v. Board of Education,* 391 U.S. 563 (1968) (teacher's letter to newspaper on issue of allocation of school funds found to be protected). The fact that the plaintiff made his statement at a Board meeting does not alter the result. If the right of free speech does not attach when one addresses the policy-making body concerned with the issue, it is meaningless. In the case at bar, the Board was the governing body concerned with making decisions on whether the county would enter cooperative road-building agreements with the state and whether county equipment would be used to clear private roads. These are not issues of internal management, but are matters of general public concern. As such, they are entitled to first amendment protection.

The defendants' second contention that the county's need for efficient management outweighs the plaintiff's first amendment rights also is not well taken. The defendants have presented no evidence indicative of whether the plaintiff's expression of his views hampered the efficient operation of the road department. Therefore, summary judgment on the first amendment issue is inappropropriate.

III. *Claim of Deprivation of a Liberty Interest in Reputation*

In order to establish a claim of deprivation of a liberty interest in reputation under 42 U.S.C. § 1983, a plaintiff must establish two things: first, that the complained of conduct stigmatized or otherwise damaged the plaintiff's reputation, and second, that the reputational damage was "entangled with some other 'tangible interest such as employment.'" *McGhee v. Draper,* 639 F.2d 639, 643 (10th Cir. 1981), *quoting Paul v. Davis,* 424 U.S. 693, 701 (1976). Any termination occurring in an atmosphere where the plaintiff's reputation is at issue is sufficient to meet the entanglement requirement. *McGhee v. Draper, supra* at 643, n. 2.

Of concern to the plaintiff, *inter alia,* were statements by Board members that he was "padding his employees' time" and that he was "dragging out" the cooperative projects. Depo. of Ewers at 156. The defendants contend that these statements constitute a criticism of job performance which was privileged. These statements are susceptible to interpretation as impugning the ethics of the plaintiff, rather than being a mere job performance evaluation. Further, there is some evidence that these statements were made in public meetings with reporters present. *See* Depo.

of Ewers at 157. Although the defendant argues that the official setting of these statements insulates it from § 1983 liability, this clearly is not the case. Where stigmatizing charges are made at an official meeting, and the subject of the charges is not allowed a hearing to clear his name, § 1983 liability may attach. *See McGhee v. Draper*, 564 F.2d 902 (10th Cir. 1977). Genuine issues of material fact exist with regard to whether these statements damaged the plaintiff's reputation and whether they were sufficiently entangled with the abolishing of the position of road superintendent to constitute a constitutional infringement. Summary judgment, therefore, is inappropriate on this issue.

IV. *Claims under § 1985(3) and for Denial of Equal Protection*

The defendants assert that they are entitled to summary judgment on plaintiff's claims of denial of equal protection and violation of 42 U.S.C. § 1985(3) because the plaintiff has not alleged any racial animus. The plaintiff has chosen not to respond to these arguments in his response to the defendants' motions for summary judgment.

In order to state a claim under § 1985(3), one must allege racial animus or other invidiously discriminatory, class-based animus. *United Brotherhood of Carpenters & Joiners of America v. Scott*, 51 U.S.L.W. 5173, 5176 (U.S. Oct. 3, 1983); *Griffin v. Breckenridge*, 403 U.S. 88 (1971). Similarly, a claim of denial of equal protection under the fourteenth amendment requires a showing of a racially discriminatory purpose. *Washington v. Davis*, 426 U.S. 229 (1976). (*Washington v. Davis* was decided under the due

process clause of the fifth amendment. However, under these circumstances, analysis of the fifth amendment due process clause and of the equal protection clause of the fourteenth amendment is identical. *See Bolling v. Sharpe*, 347 U.S. 497 (1954).) There is no allegation in the complaint that the defendants acted with a racially discriminatory purpose, nor does it appear that an allegation of class-based animus could be made. The defendants are entitled to summary judgment on plaintiff's claims of violation of 42 U.S.C. § 1985(3) and of denial of equal protection.

V. *Claim of Denial of Property Without Due Process*

The defendants seek summary judgment on plaintiff's denial of property without due process claim on two grounds: first, that the plaintiff did not have a property interest in employment, and second, that due process was afforded. The first issue is dispositive.

In determining whether a property interest in employment exists, the Court must look to state law. *Board of Regents v. Roth*, 408 U.S. 564 (1972). It is not enough that the plaintiff have a need for, or unilateral expectation of continued employment; a plaintiff must have an entitlement to continued employment for operation of the due process clause to be triggered. *Id.* at 577. New Mexico law is well settled that in the absence of an employment contract for a definite term, an employee is terminable at will by his employer, and has no entitlement to continued employment. *Gonzales v. United Southwest National Bank of Santa Fe*, 93 N.M. 522, 602 P.2d 619 (1979); *Bottijliso v. Hutchison Fruit Co.*, 96 N.M. 789, 635 P.2d 992 (Ct. App.

1981). *See also Abeyta v. Town of Taos*, 499 F.2d 323 (10th Cir. 1974).

New Mexico courts, however, recognize several exceptions to this general rule. One such exception arises where personnel regulations or policies prescribe termination procedures, and the discharged employee alleges that his termination was not in accordance with those procedures. *Hernandez v. Home Education Livelihood Program, Inc.*, 98 N.M. 125, 645 P.2d 1381 (Ct. App.), *cert. denied*, 98 N.M. 336, 648 P.2d 794 (1982); *Forrester v. Parker*, 93 N.M. 781, 606 P.2d 191 (1980). Under these circumstances, the state courts have found an implied employment contract. *Hernandez v. Home Education Livelihood Program, Inc., supra* at 128.

The plaintiff argues that the personnel policies of the county are sufficient to create such a property interest. The regulations of the county at issue in this suit provide, "Employees cannot be discharged without cause, unless position is abolished." Ex. AF to Defendants' Merrill and Gattis' Motion for Summary Judgment. No express termination procedures are created. There is a grievance procedure which provides that an employee with a grievance may have a hearing before his immediate supervisor and, if still dissatisfied, before the county commission. The grievance procedure further provides that the decision rendered by the county commission is final and binding. On the facts of this case, these personnel policies are insufficient to create a property interest. Although no New Mexico law exists on point, rulings in other jurisdictions are persuasive. *See DeBono v. Vizas*, 427 F. Supp. 905 (D. Colo. 1977), *aff'd*, No. 77-1299, slip op. (10th

Cir. Dec. 18, 1978) (unpublished); *Poolaw v. City of Andarko*, 660 F.2d 459 (10th Cir. 1981) (explaining ruling in *DeBono, supra); see also Bunting v. City of Columbia*, 639 F.2d 1090 (4th Cir. 1981).

In *DeBono*, the court held that no property interest in employment existed where a state statute provided "officers and employees appointed by the city manager may be removed by him at any time for cause. The decision of the city manager in any such case shall be final." *DeBono v. Vizas, supra* at 907. The court reasoned that the phrase "for cause" did not create a property interest in employment because no termination procedure was set out and because the decision of the city manager was final. Thus, the city manager had unfettered discretion in determining what constituted cause. Similarly, in the case at bar, no termination procedure is afforded. To the extent that the grievance procedure qualifies as a termination procedure, the final decision is left with the county commissioners, the very body which undertook the action to terminate the plaintiff's employment. The case at bar falls squarely within the circumstances found not to create a property interest in *DeBono, supra*. The factual basis for recognizing an implied employment contract does not exist in these circumstances. This case does not fall within any exception to New Mexico's "terminable at will" rule. Because the Court finds that no property interest exists, the issue of whether due process was afforded need not be reached.

Wherefore,

IT IS ORDERED, ADJUDGED AND DECREED that defendants' motions are granted as to Ewers' claims

for violation of 42 U.S.C. § 1985(3), for denial of equal protection and for deprivation of property without due process; and in all other respects, the motions are denied.

DATED this 25 day of June, 1984.

/s/ Juan L. Burciaga
United States District Judge

APPENDIX D

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. CONST., amend. I, cl. 2

Congress shall make no law . . . abridging the freedom of speech, ...

U.S. CONST., amend VII

In Suits at comomn law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

42 U.S.C. Section 1983

Section 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory or the District of Columbia, subjects, or causes to be subject, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purposes of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.